

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ALEXANDER KOSNICKI,

Petitioner,

v.
UNITED STATES OF AMERICA,
Respondent.

CASE NO. C13-01002-RAJ

**ORDER DENYING PETITIONER'S
MOTION UNDER 28 U.S.C. § 2255
TO VACATE, SET ASIDE, OR
CORRECT SENTENCE BY A
PERSON IN FEDERAL CUSTODY**

I. INTRODUCTION

This matter comes before the Court on Petitioner's 28 U.S.C. § 2255 Amended Motion to Vacate, Set Aside, or Correct a Sentence. (Dkt. #15). Petitioner Alexander Kosnicki challenges the 48-month sentence imposed on him by this Court after he pled guilty to one count of possession of Fentanyl with intent to distribute and one count of possession of a firearm by a convicted felon.

Petitioner timely brought this petition and now challenges his sentence on the basis of ineffective assistance of counsel. After full consideration of the record, and for the reasons set forth below, Mr. Kosnicki's § 2255 Petition is denied.

II. BACKGROUND

On October 17, 2012, Mr. Kosnicki pled guilty to one count of possession with intent to distribute, and one count of possession of a firearm by a felon. Case No. CR12-00144-RAJ,

Dkt. #25. Mr. Kosnicki was initially detained by the Seattle Police Department on April 24, 2012 after engaging in narcotic activity with a confidential informant for the Drug Enforcement Administration (“DEA”). Dkt. #17, Ex. E at 2, 8. Following arrest, Mrs. Kosnicki was transported to the DEA’s Seattle office. *Id.* at 8. A telephonic search warrant for Mr. Kosnicki’s houseboat and vehicle was subsequently issued. *Id.* at 8. Execution of the warrant uncovered large amounts of U.S. currency, as well as what appeared to be Fentanyl, on Mr. Kosnicki’s property. *Id.* at 8-9. After Mr. Kosnicki was advised of his *Miranda* rights he agreed to speak with DEA detectives and agents. *Id.* at 9. Mr. Kosnicki then admitted to the possession of firearms. *Id.* The DEA retrieved Mr. Kosnicki’s firearms after obtaining his consent. *Id.* In an effort to protect the identity of their confidential informant, the Government’s charges against Mr. Kosnicki stemmed from evidence found during execution of their search warrant and information volunteered by Mr. Kosnicki after he was detained. *Id.* at p. 33-34. After Mr. Kosnicki’s arrest, attorney Ralph Hurvitz was appointed to represent him. Case No. CR12-00144-RAJ, Dkt. #4.

During his October 17, 2012 change of plea hearing, Magistrate Judge Mary Alice Theiler advised Mr. Kosnicki of the rights he waived by pleading guilty, the charges against him, and the sentencing guidelines. Case No. CR12-00144-RAJ, Dkt. #57. At several points throughout this proceeding, Mr. Kosnicki was asked if he needed additional time to decide whether to plead guilty – Mr. Kosnicki stated that he did not need additional time. Dkt. #17, Ex. B at 8-10, 12, 25. Mr. Kosnicki’s guilty plea was accepted on November 5, 2013. Case No. CR12-00144-RAJ, Dkt. #28.

On February 18, 2013, four days before his sentencing hearing, Mr. Kosnicki filed a motion to withdraw his guilty plea. Case No. CR12-00144-RAJ, Dkt. #32. Mr. Kosnicki

1 claimed ineffective assistance of counsel and identified three bases for withdrawing his plea: 1)
2 Mr. Kosnicki felt pressure to accept his guilty plea as a result of threats made against him by
3 the Government's confidential informant; 2) Mr. Kosnicki's counsel did not investigate the
4 confidential informant's misconduct; and 3) Mr. Kosnicki did not understand the constitutional
5 rights he waived when he pled guilty. *Id.* Consideration of Mr. Kosnicki's motion to
6 withdraw, as well as his sentencing, was continued until March 6, 2013. *Id.*

7 On March 6, 2013, this Court denied Mr. Kosnicki's motion to withdraw his guilty plea
8 and he was sentenced to 48 months imprisonment. Case No. CR12-00144-RAJ, Dkt. #41. The
9 Court found that Mr. Kosnicki's bases for attempting to withdraw his guilty plea did not
10 demonstrate a "fair and just reason" for withdrawal because the alleged threats against him
11 could not be verified in the audio recordings between him and the confidential informant, Mr.
12 Kosnicki was not able to demonstrate ineffective assistance of counsel, and Mr. Kosnicki could
13 not identify which rights he misunderstood when he pled guilty. Case No. CR12-00144-RAJ,
14 Dkt. #52. New evidence to justify a withdrawal was not presented. Mr. Kosnicki timely
15 appealed his sentence.

16 On May 16, 2014, the Ninth Circuit affirmed this Court's decision to preclude Mr.
17 Kosnicki from withdrawing his guilty plea. Case No. CR12-00144-RAJ, Dkt. #60. Mr.
18 Kosnicki's ineffective assistance of counsel claim was not reviewed. *Id.*

19 Before resolution of his direct appeal, Mr. Kosnicki filed a Petition for Writ of Habeas
20 Corpus under 28 U.S.C § 2255. Dkt. #1. Mr. Kosnicki's § 2255 petition was stayed until
21 resolution of his direct appeal. Dkt. #7. Following the Ninth Circuit's decision, Mr. Kosnicki
22 filed an amended § 2255 motion. Dkt. #15. Mr. Kosnicki now seeks an order from this Court
23 vacating his sentence on the basis of ineffective assistance of counsel.

III.DISCUSION

A motion under 28 U.S.C. § 2255 permits an in-custody, federal prisoner to collaterally challenge his sentence on the ground that it was imposed in violation of the Constitution or laws of the United States, that the Court lacked jurisdiction to impose the sentence, or that the sentence exceeded the maximum authorized by law. Petitioner challenges his sentence on the ground that he received ineffective assistance of counsel prior to pleading guilty. The Court finds that Petitioner is not entitled to an evidentiary hearing in this matter because the Petition, files, and totality of the record conclusively demonstrate that Mr. Kosnicki is not entitled to relief. *See United States v. Howard*, 381 F.3d 873, 877 (9th Cir. 2004).

A. Standard of Review for Ineffective Assistance Claims.

To establish a claim for ineffective assistance of counsel, Petitioner must prove (1) that counsel's performance was deficient and, (2) that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Petitioner must demonstrate that his counsel's performance fell below an objective standard of reasonableness to establish deficient performance. *Id.* at 688. A strong presumption exists that counsel was within the range of reasonable assistance. *Id.* at 689. To establish that counsel's performance prejudiced the defense, Petitioner must demonstrate "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985).

Mr. Kosnicki claims he received ineffective assistance of counsel in three ways: 1) his counsel did not adequately investigate threats made against him by the Government's confidential informant; 2) his counsel did not investigate, or object to, the Government's use of

1 statements allegedly obtained in violation of his *Miranda* rights; and 3) his counsel misadvised
 2 him about his ability to withdraw a guilty plea.

3 **B. Counsel's Investigation of Threats Made Against Mr. Kosnicki Was Not
 4 Unreasonable.**

5 Mr. Kosnicki first argues that his counsel was ineffective because he failed to
 6 adequately investigate threats made against him by the Government's confidential informant.
 7 Mr. Kosnicki claims that had his counsel investigated these allegations he would have been
 8 able to determine if "an entrapment defense or other defense was available" to him, and he
 9 would not have pled guilty. Dkts. #15 at 13 and #22 at 2. The record does not support this
 10 claim.

12 Defense counsel has a duty "to make reasonable investigations or to make a reasonable
 13 decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691.
 14 Included within this duty is the duty to investigate a defendant's "most important defense."
 15 *Bragg v. Galaza*, 242 F.3d 1082, 1088 (9th Cir. 2001) (quoting *Sanders v. Ratelle*, 21 F.3d
 16 1443, 1457 (9th Cir. 1994)). When counsel decides not to undertake an investigation, the
 17 reasonableness of this decision must be assessed. *Id.* An ineffective assistance of counsel
 18 claim fails when counsel is "well-informed," and a defendant does not identify the additional
 19 information to be obtained by discovery. *Id.*

22 Defense counsel's investigation of threats allegedly made by the Government's
 23 confidential informant was not unreasonable. Mr. Kosnicki alleges that he informed counsel of
 24 the threats made by the confidential informant before he pled guilty. Case No. CR12-00144-
 25 RAJ, Dkt. #52 at 9 and 11-12. The record indicates that Mr. Kosnicki's counsel considered this
 26 information and decided that entrapment or duress were not viable defenses. Dkt. #17, Ex. C at
 27 4. Counsel's decision was reasonable given the following: 1) Mr. Kosnicki was not charged for
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1 narcotic activity he engaged in with the confidential informant; the charges against him arose
2 after execution of a search warrant on his property; 2) Mr. Kosnicki's prior narcotics activity
3 with the confidential informant undermined the "predisposition" element of an entrapment
4 defense; and 3) a duress defense was unlikely to succeed because Mr. Kosnicki did not
5 surrender to authorities, and one week had lapsed between the date of the alleged threats and
6 Mr. Kosnicki's arrest. Not only does Mr. Kosnicki fail to demonstrate that counsel did not
7 investigate his "most important defense," he also does not identify what additional information
8 his counsel failed to discover.

9
10 Even if counsel had failed to adequately investigate Mr. Kosnicki's claims, Mr.
11 Kosnicki has not demonstrated how counsel's actions prejudiced him. At his March 6, 2013
12 hearing before this Court, Mr. Kosnicki acknowledged that the confidential informant's threats
13 did not influence his decision to plead guilty. Case No. CR12-144-RAJ, Dkt. #52 at 8. What's
14 more, the recordings between the confidential informant and Mr. Kosnicki, which Mr. Kosnicki
15 claims "could have placed the whole case in such a different light," do not contain audible
16 threats. Dkts. #15 at 20 and # 17, Ex. D. Notably, even if the audio tapes contained audible
17 threats, for the reasons outlined above, it was not unreasonable for counsel to decide that no
18 defense was supported by them.

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21 **C. Counsel's Failure to Investigate and File a Motion to Suppress Evidence Was**
Not Unreasonable.

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23 Mr. Kosnicki next claims ineffective assistance of counsel because his counsel did not
24 investigate, or move to suppress, statements made after Mr. Kosnicki's invocation of right to
25 counsel was allegedly ignored. Dkt. #15 at 6-7. Mr. Kosnicki claims that he would not have
26 pled guilty had his counsel challenged the Government's use of these statements. *Id.* at 22.
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The Court does not agree that counsel's alleged failure to investigate, or his failure to move to suppress, Mr. Kosnicki's "uncounseled" statements amounts to ineffective assistance of counsel. Counsel's failure to investigate claims raised for the first time in this Petition was not unreasonable. The record indicates that following arrest Mr. Kosnicki was transported to the DEA office in Seattle where he was read his *Miranda* Rights. Dkt. #17, Ex. E at 9. Mr. Kosnicki does not allege, and the record does not indicate, that an invocation of the right to counsel was made after Mr. Kosnicki was informed of these rights. *Id.*; Dkt. #16 at 4-9. The record indicates that Mr. Kosnicki agreed to speak with detectives and agents after acknowledging that he understood his *Miranda* rights. Dkt. #17, Ex. E at 9. The record further indicates that Mr. Kosnicki did not inform his counsel of his alleged attempt to invoke his right to counsel. Dkt. #16 at 5-9. In fact, Mr. Kosnicki appears to have cooperated with authorities based on his belief that he was helping them "set up" their confidential informant. Dkt. #16 at 5. He also admitted to counsel that statements he made during his interrogation were not coerced. Dkt. #17, Ex. C at 4.

Given Mr. Kosnicki's statements to counsel, information contained in the police reports, as well as Mr. Kosnicki's self-admitted desire to cooperate with law enforcement officials, counsel's decision not to file a motion to suppress was also not unreasonable. It is not unreasonable for counsel to decide against filing motions that clearly lack merit. *U.S. v. Molina*, 934 F.2d 1440, 1447 (9th Cir. 1991). During a custodial interrogation, a person who invokes their right to counsel cannot be subjected to further interrogation "unless the accused himself initiates further communication, exchanges, or conversations with the police." *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981). The record does not support the contention that Mr. Kosnicki's admissions were taken in violation of his *Miranda* rights. Mr. Kosnicki claims he

1 invoked his right to counsel following his initial arrest by the Seattle Police Department. Dkt.
2 #15 at 22. However, the record indicates that Mr. Kosnicki was not interrogated or interviewed
3 by his arresting officers. Dkt. #17, Ex. E at 2 and 8. Furthermore, once he was transported to the
4 DEA's office, Mr. Kosnicki was read his *Miranda* rights and he agreed to speak with the DEA
5 agents. Dkt. #17, Ex. E at 9. Given Mr. Kosnicki's actions, a motion to suppress his admissions
6 was unlikely to succeed.

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D. Mr. Kosnicki Was Properly Advised of His Right to Withdraw a Guilty Plea.

8 Finally, Mr. Kosnicki argues that he would not have pled guilty had his counsel
9 correctly advised him of his ability to withdraw a guilty plea. Dkt. #15 at 23-24. The record
10 contradicts this assertion. At his change of plea hearing, Mr. Kosnicki did not say anything to
11 indicate that he believed his plea was revocable at any time. In fact, when asked, Mr. Kosnicki
12 indicated that no promises, other than those contained in his plea agreement, were made to him
13 in return for pleading guilty. Case No. CR12-00144-RAJ, Dkt. #57 at 24.

14 Even if Mr. Kosnicki presented evidence to support this allegation, the record does not
15 support a finding of prejudice. Mr. Kosnicki cannot demonstrate prejudice because the record
16 does not indicate that he placed significant weight on his ability to withdraw a guilty plea when
17 he pled guilty. At his change of plea hearing, Mr. Kosnicki did not say anything to indicate the
18 significance he placed on his ability to withdraw his guilty plea. When asked by Judge Theiler
19 if he had any questions concerning his plea agreement, Mr. Kosnicki did not raise concerns
20 about his ability to withdraw a plea agreement. *Id.* at 25. Mr. Kosnicki has therefore not
21 presented sufficient evidence to find a "reasonable probability" that but for his counsel's
22 alleged misadvice, he would not have pled guilty.

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2 **IV. CONCLUSION**
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4 The Court, having considered Petitioner's motion, Respondent's response thereto,
5 Petitioner's Reply, and the remainder of the record, hereby finds and ORDERS:
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- 8 1) Petitioner's 28 U.S.C. § 2255 motion (Dkt. #15) is DENIED.
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- 10 2) The Clerk of the Court is directed to forward a copy of this Order to Petitioner and
11 all counsel of record.
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- 13 3) This matter is now closed.
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15 DATED this 24th day of February, 2016.
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19 The Honorable Richard A. Jones
20 United States District Court
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